SUPREME COURT OF KENTUCKY
CASE NOS. 2014-SC-000373, ~~000389, 000394~~
COURT OF APPEALS NO. 2012-CA-001961
2014-SC-389, 2014-SC-394

GARRY MARTIN, BOBBY MOTLEY, AND
MIKE SAPP

APPELLANTS

VS. ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS
2012-CA-001961
APPEAL FROM THE FRANKLIN CIRCUIT COURT
SUMMARY JUDGMENT
HONORABLE SHEILA R. ISAAC, SPECIAL JUDGE
NO. 07-CI-00820

STEPHEN O'DANIEL

APPELLEE

BRIEF OF APPELLEE STEPHEN O'DANIEL

THOMAS E. CLAY, P.S.C.
CLAY DANIEL WALTON & ADAMS, PLC
Meidinger Tower, Suite 101
462 S. Fourth Street
Louisville, KY 40202
(502) 561-2005
Counsel for Appellee Stephen O'Daniel

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the Brief of Appellee Stephen O'Daniel was served on the 17th day of July, 2015, via U.S. mail, first class, postage prepaid upon Hon. Shelia Isaac, Special Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky 40602-0678; L. Scott Miller, 919 Versailles Road, Frankfort, Kentucky 40601; William E. Johnson, 326 W. Main Street, Frankfort, Kentucky 40601; Charles E. Johnson, Heidi Engel, 43 S. Main Street, Winchester, Kentucky 40391; Michael Troop, 178 Colston Lane, Frankfort, Kentucky 40601; Timothy A. Sturgill, General Counsel, Kentucky Association of Counties, 400 Englewood Drive, Frankfort, Kentucky 40601; John F. Estill, 24 W. 3rd Street, Maysville, Kentucky 41056. It is further certified that the record on appeal has not been removed from the Court of Appeals' Office.

THOMAS E. CLAY, P.S.C.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee O'Daniel requests oral argument in this case. Appellee believes that an oral argument will assist the Court in clarifying any issues that may not have been fully addressed in the parties' briefs.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The facts underlying this litigation have been briefed extensively and have been the subject of written opinions of both the trial court and the Court of Appeals.[1]

The most recent version is the Court of Appeals' Opinion Reversing and Remanding rendered on June 13, 2014. In that Opinion, the Court of Appeals fairly and accurately repeats the original factual summary in the Appellants' third appeal to that court.[2]

In the view of the Appellee, these facts further lead to the conclusion that the Appellants acted with malice and without probable cause. These acts included affirmative acts of deception and false testimony as well as deliberate acts of withholding exculpatory evidence. While the Appellee is loath to accuse the Appellants of outright lying, the record establishes that all three Appellants participated in an egregious conspiracy to mislead the prosecutors, the grand jury that returned the one count Forgery, second degree, indictment, the petit jury which sat for the criminal trial, and the court.[3]

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[1] a. February 15, 2008, Order Denying Motion to Dismiss.
b. December 1, 2008, Order Granting Motion by Bill Riley and Denying Motions of Defendants Sapp, Motley and Martin.
c. 2008-CA-002292-MR, March 9, 2009, Order Dismissing appeal.
d. September 10, 2009, Order Denying Motion for Summary Judgment.
e. ***Martin v. O'Daniel***, 2009-CA-001738, Discretionary Review denied, March 14, 2012.
f. October 23, 2012, Summary Judgment granted.
g. ***O'Daniel v. Sapp***, 2012-CA-001961-MR.

[2] Certain facts of record do not appear in these opinions.

[3] Their efforts to deceive the petit jury came a cropper. The criminal trial was Appellee's first opportunity to present his side of the case, other than to Franklin County Commonwealth Attorney Larry Cleveland, who, on hearing O'Daniel's side and KSP's investigative results, declined to present the case to the grand jury because of O'Daniel's "lack of intent."

A. SGT. GARY MARTIN

Martin's deceptions first became of record when he testified before the Franklin County Grand Jury on October 18, 2006.[4]

> [I]t [Confidential VIN report] was completed on the 22nd [March, 2006] when the vehicle was inspected. I guess - - it's not a normal course of business to give these out because State Farm always had a copy of the inspection report. . .I guess, doing a favor on direction from Justice, the State Police faxes a copy of [KSP's detective] Bill Riley's inspection report to David Marshall, Steve O'Daniel's attorney in Jessamine County. ***Id.***, p. 20.

As noted by the Court of Appeals in its June 13, 2014, Opinion, "[t]he report is called a 'confidential report' because it reflects information obtained from a review of the 'confidential' or hidden VIN. It is not meant to be kept confidential." Opinion, p.3, FN 1.

Martin then proceeds to give false testimony to the grand jury about how many times Jessamine County Clerk Eva McDaniel was interviewed.

> CWTH ATTY: In fact, you went back later to Ms. McDaniel and interviewed her with regards to this transaction?
>
> WITNESS [Martin]: She was interviewed twice, that's correct. They're both recorded. ***Id.***, p. 23.

Eva McDaniel was interviewed three times.

On the day following O'Daniel's acquittal, Tony Henderson, the foreman of the jury, called O'Daniel's wife. Mr. Henderson stated he knew very early in the trial that KSP and State Farm witnesses lied and conspired together. He stated it took only a very few minutes to get a unanimous vote for not guilty. Further, as soon as the first KSP witness was on the stand, they knew he was lying. He stated Larry Cleveland is very well thought of in Franklin County, and, by choosing not to prosecute this case, he did the right thing, and that speaks volumes about what KSP did. Mr. Henderson told Mrs. O'Daniel that he thought KSP is corrupt, but that this was an all-time low even for them. Mr. Henderson stated that he has served as a juror several times before this trial, and this trial was the most unfair thing he ever witnessed. KSP should be fired and changed. He understands what perjury is. (Sapp depo., pp. 172-174, Ex. 2.)

[4] Ex. 1

The first interview was conducted by Appellant Motley on May 9, 2006. It was recorded.[5]

The second recorded interview by Martin and Motley was on June 6, 2006. [6]

The third recorded interview by Martin and Motley was on June 9, 2006.[7]

The Commonwealth produced Bates stamped documents in response to O'Daniel's discovery request. These documents included the June 6 and 9th interviews. (Bates stamp 398-454.) Conspicuously absent from this production were the tape and transcript of the May 9, 2006 interview.

In reviewing the investigative file produced by KSP, it appeared that the May 9th interview had been omitted. KSP did produce page 5 of 9 of the KYIBRS Report.[8] The May 9, 2006 entry referencing Motley's "contact" with Eva McDaniel is chronologically out of place, and it further omits significant details McDaniel actually provided Motley during the recorded interview that was withheld in discovery. O'Daniel issued a subpoena *duces tecum* for the complete KSP investigative file. KSP's custodian of records appeared in response to the subpoena without the May 9th interview. O'Daniel then served three subpoenas *duces tecum*, one on each Appellant individually. On the date specified in the subpoena, April 3, 2007, the Appellants again failed to produce the May 9th interview. It was only after counsel for O'Daniel told the prosecutors specifically about the May 9th interview that the transcript was produced on April 6,

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[5] Ex. 3
[6] Ex. 4
[7] Ex. 5
[8] Bates 000034, Ex. 6

2007. The transcript was not Bates stamped.[9] Review of the May 9th interview reveals why the Appellants sought to conceal it.

The Jessamine County Clerk provided a simple explanation of what transpired when O'Daniel sought her assistance in securing a corrected title. O'Daniel laid out the corrections which he needed to get an accurate title, ***viz.,*** changing the VIN and year of the vehicle. Eva McDaniel did what would be expected of a clerk who had questions about what needed to be done. She called DOT and talked to Wanda Hano, who checked on the problem and called McDaniel back with instructions to get a State Police inspection, a procedure McDaniel had never done previously. When O'Daniel returned, they did the paperwork exactly as Wanda Hano and Annette Holmes had directed. This interview established that Steve O'Daniel never attempted to deceive or defraud anyone about his efforts to secure a corrected title and that Eva McDaniel followed the instructions she received from DOT precisely. (Ex. 3.)

As of his appearance before the grand jury, Martin was aware that the civil action for a declaration of rights O'Daniel had filed in Jessamine Circuit Court had concluded and that the Jessamine Circuit Judge had ordered State Farm to deliver a "clear" title to O'Daniel.[10]

Martin then proceeds to offer more false testimony.

> WITNESS [Martin]: A Jessamine County Judge had ordered State Farm to turn the vehicle over to Mr. O'Daniel and for Transportation to issue a title to him - - a clear title. So the best information I have at this point is Department of Transportation is appealing this. I mean, judges are wrong

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[9] Ex. 3

[10] Ex. 1 - The Appellants had falsely maintained from the outset that DOT could issue only a "salvage or rebuilt" title.

(WITNESS [Martin]: Correct. It would be a salvage or rebuilt.) (Ex.1, p. 33)

and he issued this order, but that does not mean that that's a final order. (Ex.1, pp. 32-3.)

In fact, the Order was final. The Order required State Farm to obtain a "clear" title and give it to O'Daniel. Furthermore, DOT's general counsel Todd Shipp testified at the trial that he never told anyone at KSP that DOT was going to intervene in the case, let alone appeal any order from the Jessamine Circuit Court. (Video: 48-1-07-VCR-16; 12:45:55-12:46:12)

The most glaring example of Martin's perjury actually occurred during the trial. On cross-examination, Martin admitted he had given an inaccurate answer to the grand jury to the question of how many times Eva McDaniel had been interviewed. (48-1-07-VCR 15; 4:27:10)

He lied a second time at the trial in response to a question about when he first became aware of the May 9th interview. His memory was suspiciously vague; however, he did remember the year, "2007."

Within a few minutes the extent of his deception became obvious when he acknowledged that he actually knew about the first interview on June 6, 2006, as a result of a conversation he had with Motley when they were on the way to interview Eva McDaniel for the second time. (***Id.***, 4:55:10.)

B. BOBBY MOTLEY

Motley was the lead person on the investigation and was directly responsible for producing (or withholding) material turned over to the defense in discovery, by the prosecution in the criminal case.

He was also present with the other two Appellants when they met with Larry Cleveland to discuss their criminal investigation. Incredibly, according to Motley, the

three Appellants were seeking a criminal prosecution against Lieutenant Governor and Justice Secretary Steve Pence, Deputy Justice Secretary C. Cleve Gambill, Justice Cabinet General Counsel Luke Morgan, and Steve O'Daniel. (48-1-07-VCR-16; 10:54:45).

Sapp recalled Motley advocating to Larry Cleveland that "everybody ought to be indicted."

> Q: You-all discussed the situation, Bob and the Lieutenant Governor, Steve Pence, and you gave Mr. Cleveland your opinion that you believed he was so far removed from involvement in this scenario that no criminal prosecution was warranted; is that accurate?
> A: Yeah. I think so.
> Q: Did everybody there concur with your assessment?
> A: I think so. I think Bobby made a statement to the effect that, "I think everybody ought to be indicted," and I said, "no, that's not what we're here for." And that was the only disagreement, I guess, and I think he just - - I don't think he was serious about that when he made that statement, but he did make that statement.
> Q: Bobby Motley?
> A: Yeah.

Sapp depo, p.98. (Ex. 2)

C. MIKE SAPP

As the highest-ranking member of this triumvirate, Sapp acknowledged that "the buck stopped with him." (48-1-07-VCR-16; 1:15:40.) He admitted that he had been insubordinate by refusing to follow two direct orders from the Justice Cabinet to assign any investigation to another law enforcement agency and to transfer the vehicle in question out of KSP's custody to another agency.

Incredibly, Sapp could not identify a single person or entity who had been defrauded by O'Daniel's actions. He specifically stated that neither the Department of Transportation, nor State Farm, nor KSP, nor Eva McDaniel had been defrauded. (48-1-

07-VCR-16; 1:15:39 – 1:18:31)(Query: Given Sapp's admission that no person or entity was defrauded, is this probable cause to support a charge of forgery, second degree?)

Appellee will address specific representations of the Appellants in their Statements of the Case.

Statement (Sgt. Motley)

"The plaintiff [**sic**.], disregarded the KSP plan, and attempted to gain a speed title." p.2 "[H]e unlawfully altered information on the title to reflect a different year and VIN number than was reflected on the original purchase title." p. 3.

FACT: O'Daniel was not bound by KSP's plan. In fact, the "plan" he pursued was entirely lawful. He consulted with the Jessamine County Clerk, Eva McDaniel, who consulted with DOT employee Wanda Hano. Ms. Hano provided detailed instructions to Ms. McDaniel about the steps to take for O'Daniel to secure a title that reflected correctly the VIN and model year of the stolen vehicle he had purchased innocently. (Ex. 3, p. 1-2) O'Daniel also filed a declaration of rights action in Jessamine Circuit Court naming as defendants State Farm Insurance Co. and the individual from whom he had purchased the 1975 Corvette. O'Daniel did not "unlawfully" alter any information on the title. He acted strictly in conformance with the instructions from Ms. McDaniel and Ms. Hano.

Statement (Sgt. Motley and Sgt. Martin)

"Unfortunately, Appellee's bosses with the Justice and Public Safety Cabinet became involved in supporting Appellee's claim to the car." (Sgt. Martin Brief, p.2)

"Appellee's superiors with the Justice and Public Safety Cabinet became involved in supporting his claim to the car." (Sgt. Motley Brief, p.3)

Fact: The testimony of former Deputy Justice Secretary, U.S. Attorney, and U.S. Magistrate Judge C. Cleve Gambill is unequivocal on this issue.[11]

Q: Now, throughout these questions here, certainly, it's been my perspective that they have tried to paint a picture that Steve O'Daniel somehow was the recipient of preferential treatment. Is that what you and the lieutenant governor attempted to do when this matter was brought to your attention?
A: No.
Q: In fact, it was exactly the opposite, wasn't it?
A: It was exactly the opposite. I was afraid, being a lawyer, we lawyers, we kind of - - our little antennae go up, now, is this going to actionable **[sic.]** or are we going to end up in a court over this? What Steve O'Daniel and what anybody, if they advised me that somebody in our cabinet was doing something that was outside the ordinary scope of their duties, my fear was we were going to get sued, and if Steve O'Daniel - - you know, I was afraid that we were going to end up in a lawsuit and, guess what, here we are.
Q: All right. You had a discussion with the lieutenant governor and Mark Miller who was then the commissioner of the Kentucky State Police about what to do involving this situation, right?
A: Luke.
Q: And Luke Morgan?
A: (Nods.)
Q: Okay. Who made the decision about what to do?
A: The lieutenant governor.
Q: What was his decision?
A: To remove the investigation of the ownership of the car to another police department.
Q: Was that communication - - was that decision communicated to the Kentucky State Police?
A: Yes.
Q: In what fashion?
A: Orally, at first.
Q: To whom?
A: To Mark Miller.
Q: All right. Was that order complied with?
A: Not until for another few weeks.

Gambill depo, p.102, l.16 – p.104, l.3

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[11] Ex. 7

Q: So getting back to this conversation, what else was said?

A: You know, I've summarized it. It was about a two hour conversation. I'm not exaggerating there, but that's about, basically, what we said in two hours. It was - - he was not going to take no for an answer, and I remember saying, Mark, you and I have both been in the military. When the general tells the colonel to do something, and the colonel tells the major, the major doesn't say I - - that's a bad idea. You know, you don't - - you just follow orders, and I'm putting it to you like it was put to me. And if you have a problem with that, nonappealable or not, go talk to your friend, Steve Pence.

Q: Did Mr. Miller identify any particular person within the command of the Kentucky State Police with whom issue was being taken on this call?

A: You know, I don't know that he did. I think if he did, it was then Major Sapp, but I'm, you know, I'm not sure of my memory here.

Gambill depo. p. 106, l.16 – 107, l.9

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Q: Were you particularly concerned about the appearance of impropriety and whether a particular investigative agency might be biased against another potential target of that investigation?

A: It's always a concern.

Q: Based on your knowledge of the lieutenant governor and his experience as a Federal prosecutor and also a military judge, I might add - -

A: I know that the state police did not like Steve O'Daniel. I don't know if it was personal. I don't think it was personal. He's a nice guy. But I do know that he was perceived as a threat just by being - - by virtue of being the executive - - the director of the Office of Investigations, and Mark Miller's told me that, himself.

Q: Did the lieutenant governor share your concerns by virtue of his prior experience as the U.S. Attorney and a military judge about this appearance of impropriety?

A: He was more concerned about it being impossible for this department, for the cabinet, to have any kind of decision on this car. That would be perceived as fair by anybody unless it was something someone a - - an agency that was external. Again, my concern was the act of the - - the allegations of the conduct of the person assigned.

Gambill depo, p.115, l.4 – p.116, l.1

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Q: Okay. Let's get back to the initial instruction that the lieutenant governor gave to Mark Miller for KSP to get out of this situation. That order was not complied with, was it?
A: No.
Q: Were there subsequent orders in writing for KSP to get out of this investigation?
A: Yes.
Q: Who authored those instructions?
A: Well, I authored one of them. I remember that the lieutenant governor was so concerned that nothing was happening that we hear reports that Major Sapp, then Major Sapp was going to, whatever we were trying to do or whatever had been planned, which on the surface seemed to be agreed to by everybody, that he was going there and undermining it by talking to the various police departments. And I remember the lieutenant governor picking up his cell phone and calling Mark Miller and said, Mark, and there was no answer, and he said, Mark, I want the car moved today.

Gambill depo, p.123, l.20 – p.124, l.13

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Q: Were the Kentucky State Police insubordinate in carrying out the instructions of the lieutenant governor?
A: I think some were.
Q: And, specifically, who?
A: Well, I think Major, then Major Sapp was. I mean, he had no - - if he had - - that was the first time I heard of his involvement, that question was asked me, was when he interfered with the Scott County, and we didn't go to Jessamine County. We went to Scott County. That was the first decision. That's where the lawsuit was being. And other than that, I don't know. That's the only, basically, as a group, it was just something that wasn't getting done. And there were - - it was a tempest in a depot [**sic.**, teapot] that should have been resolve and was a - - it was - - that's all I can say. It took on a life of its own.

Gambill depo, p.125, l.1 – p.125, l.16

Statement (Sgts. Motley & Martin)

"Appellee on several occasions contacted the Department of Vehicle Regulations and sought to obtain title to the vehicle." (Sgt. Martin, p.2; Sgt. Motley, p.3)

This statement is inaccurate. First, O'Daniel communicated with DOT through Jessamine County Clerk Eva McDaniel. Secondly, DOT can only issue a rebuilt title. O'Daniel sought and obtained a "clear" title to the vehicle.

Statement (Sgts. Motley and Martin) – Confidential VIN

"He [O'Daniel] secured this report through the efforts of Luke Morgan, general counsel for the Justice Cabinet."

O'Daniel obtained the report from his civil attorney David Marshall, who secured it through an Open Records Request to KSP submitted to Justice Cabinet General Counsel Luke Morgan.

As for the "salvage title" status of this vehicle, the Jessamine Circuit Court determined that O'Daniel should be provided a "clear" title, and so ordered. In fact, the vehicle does not qualify as salvage under the statutory definition of KRS 186.520(1)(e).

STATEMENT

> It appears prior to trial there were discovery disputes that were resolved by the trial judge. One of those disputes was when Appellee's counsel contended he had not been given one of the McDaniel recorded interviews. It was then given to Appellee's counsel and used by Appellee at trial. A similar argument was made about a personal notebook of Colonel Sapp. It was produced to Appellee's counsel and used by him at trial. *It was the prosecutor who decided what discovery materials were producible to Appellee's counsel before trial.* (Emphasis added.)(Motley, p.7; Martin, p.5)

The testimony of Special Prosecutor David Stengel addresses the inaccuracies of these statements.

First, lest there be any doubt about the critical exculpatory nature of Sgt. Motley's first interview of Eva McDaniel on May 9, 2006, Mr. Stengel's evaluation of Wanda Hano's testimony on the prosecution's case resolves this issue.

Q: That's why the May 8 [**sic.**, 9th] statement is so important, because Steve O'Daniel and Eva McDaniel confirm that when he went in there, he told her everything there was to know about this Corvette. As far as getting a corrected title, she called the Department of Transportation employee named Wanda Hannow.[**sic.**, Hano] Do you remember that?

A: I remember, the Department of Transportation – was that the woman who showed up on your side of the case?

Q: Yes, sir.

A: Okay. I had two other witnesses from Transportation, I believe, who told her flatly she couldn't do that and that's –I didn't know about this woman was good on your part.

Q: Was it a surprise surprise?

A: From you, no. I was surprised from her showing up and, *yes, she did a great deal of damage to our case, but we had not avoided her or I didn't know of her existence.*

Q: So she did a great deal of damage to your case?

A: Yes.

Stengel depo., p. 51, l.1-23. (Emphasis added.)(Ex. 8)

Eva McDaniel's May 9th interview lays out what she did and whom she contacted. Wanda Hano confirmed the details of this conversation in her testimony at the criminal trial. She kept notes of the conversation with Eva McDaniel. (48-1-070-VCR-15; 9:56)

Mr. Stengel did not "know of her existence" because the Appellants had successfully concealed her existence, although both Sgt. Motley and Sgt. Martin were aware of the May 9th interview when the duo returned for the *second* interview on June 6, 2006.

As for Appellee's statement that "the prosecutor decided what discovery materials were producible . . . ," the statement conveys the impression that Mr. Stengel and his assistant were somehow complicitors in withholding exculpatory evidence from the defense.

Q: As far as producing documents that were supplied in discovery, who conducted that?

A: That would have been Tom. You mean to us?

Q: Yes.
A: Just about everybody here in the room. We received, I know, Martin and Motley both gave us stuff. You know, they had a file. I don't remember if Major Sapp. I don't think he gave us anything. But I think the bulk of it came from them or I don't remember Franklin - - I don't think Franklin had a file. I think - - I'm sorry, Cleveland had a file. I think they took his file when he said he didn't want to prosecute it.
Q: Were you part of any discussion where the three Defendants advised you?
A: Oh, yes.
Q: These defendants right here?
A: Got you.
Q: Advised you or Tom Van DeRostyne they produced their entire file?
A: I don't think that was ever asked specifically. It was assumed by us. I don't recall whether we said, you know, if it was - - it was a side like this is this and it would have been, yeah, that's it.
Q: So when these documents were produced by the Defendants, you assumed that they had produced their entire file; is that accurate?
A: Yes, sir.
Q: You later found out they hadn't, hadn't you?
A: Are you talking about the tape?
Q: I'm talking about the tape and other things that weren't produced, as well. I'll get to them specifically.
A: I don't recall other things. I recall the tape.
Q: *But we can acknowledge the tape was not produced. The May 8, [**sic.**, 9] 2006, interview with Eva McDaniel by Mr. Motley was not produced?*
A: *That's correct.*
Q: *And they were also notes produced by Sapp. Those were not provided in discovery, either, were they?*
A: *No, sir.*

Stengel depo., p.28, l.4 – p.29, l.22 (Emphasis added.)

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Q: That's fine. I understand it's been five years. Actually, it's been six years since all this happened, and it's 2006. Okay. So aside from 7.26, you're aware that both you and Mr. Van DeRostyne said said you turned over everything to the Defendant.
A: Yes, sir, we thought we had.
Q: But you hadn't?
A: If you mean Sapp's notes, we did not.
Q: And the tape?

A: And the tape.
Q: When did you learn about the notes?
A: I didn't know they were an issue until right now. First I saw of the notes was on the witness stand when Sapp was flipping through them.
Q: So you didn't even know about them before he got on the witness stand and testified?
A: Not to my recollection, no, I do not.

Stengel depo., p.31, l.21 – p.32, l.12

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Q: So it was your understanding at the time discovery was produced by the prosecution that the three defendants had provided their entire file to you and Mr. Van DeRostyne; is that right?
A: Yes, that is correct.

Stengel depo., p. 35, l.25 - p.36, l.4

To the extent the Appellants attempt to minimize their collective misconduct in withholding evidence by stating the withheld evidence was eventually turned over to the Appellee's defense for use at trial; therefore, no foul, their argument misses the point. This is not a *Brady* or *Giglio* issue; it is an issue that relates to three elements of malicious prosecution, initiation or continuation of a criminal prosecution, without probable cause, and with malice.

Appellee also believes it is important to put into context the relationship between the Justice Cabinet and KSP, as well as O'Daniel specifically, at this time. O'Daniel's position was Director of Investigations for the Justice Cabinet. A senate bill had been proposed to provide for investigative oversight of KSP by the Justice Cabinet. To say that this bill was a major bone of contention between the Justice Cabinet and KSP was "putting it mildly." (Gambill depo., p.107.) Lt. Governor Steve Pence and Deputy Justice Secretary C. Cleve Gambill became aware of "internal issues" within the

departments under Justice, including KSP, which warranted inquiry fro a source outside KSP.

Specific incidents with KSP included the following:

1. A possible criminal violation by a KSP officer assigned to a federal task force who issued a federal grand jury subpoena to get his girlfriend's phone records. KSP did no investigation. (***Id.,*** p. 110)

2. A situation involving Appellant Sapp's conduct during a relief detail for Hurricane Katrina, in Hattiesburg, Mississippi, in which Mr. Gambill learned about a drinking party that "got out of hand." Further, Commercial Vehicle Enforcement (CVE) officers had gotten pictures of KSP troopers with their rear-ends over them while they slept. KSP personnel had been turning on their sirens at 3:00 a.m. Questions such as "How did they get alcohol in a hurricane disaster area?" "How was the alcohol transported?" Mr. Gambill "heard Mike Sapp had been very put out by our interferences in his business down there." Mike Sapp refused to discipline anybody, although CVE employees were disciplined. (***Id.***, pp.111-113)

3. Another incident involved the fatal shooting of a man involved in a marijuana drug operation. KSP Commissioner Rodney Brewer brought a video of the shooting to the Lt. Governor. The deceased was armed with a cell phone. The request by Mr. Pence for a review of the shooting by KSP was considered "interference." (***Id.***, p. 113-4)

Mr. Gambill also expressed concerns over the testimony Sgt. Martin gave to the grand jury on the subject of the Eva McDaniel interviews:

Q: Would it concern you as a prosecutor if one of the investigating officers on a case committed perjury in front of the grand jury, gave misleading evidence to the grand jury?

A: Not knowing anything about what's the basis of your question, I think the obvious answer would be - -

Q: Well, let me give you the facts. The facts are that Eva McDaniel, the clerk of Jessamine County, was interviewed three times, the first time by Sergeant Motley, the second time by Sergeant Motley and Sergeant Martin, and the third time by Sergeant Motley and Sergeant Martin, and Sergeant Martin gets before the grand jury and testifies that she was only interviewed twice. Would that be a problem?

A: When there were three times?

Q: Yes, sir.

A: Yes, that would be a problem.

Gambill, p.116, l.20 – p.117, l.11.

* * * * * * *

He was also troubled by the Appellants' withholding of evidence.

Q: Would it also be a problem if the prosecutor assigned to the case had represented in a response to a court order requiring production of discovery and documented, and exculpatory evidence that he had turned over everything and, in fact, this first statement that was taken by Sergeant Motley from Eve [**sic**.] McDaniel was not turned over?

A: And the question is what?

Q: Would it be a problem if the prosecutor made the representation that he had turned over everything, all his file, any exculpatory evidence and everything when, in fact, this statement had been withheld?

A: Well, I've been in that situation many times, and, let's see, Mr. Jensen, you're at some point the commonwealth attorney right? No, you, Charlie. So I think we would agree that is a prosecutor's nightmare that there are ramifications, you can lose cases, you can have evidence withheld, you can be sanctioned, somebody can get you with a bar complaint. You can - -

Q: Let's assume beyond that representation that everything had been turned over and there was a subpoena issued for the agency to produce the entire documentary file involved in this particular criminal prosecution and that statement still wasn't produced. Let's assume further that a subpoena is issued to the officers who conducted the investigation to produce their entire file at the proceeding on April the 3rd, 2007, and they still didn't produce it,

and it was only after a specific request was made to produce the statement from May the 9th, 2006 with Eve [**sic.**] McDaniel that the statement was turned over. And, further, that after Larry Cleveland listened to that statement he told the Kentucky State Police, quote, where's the intent, unquote, and declined to pursue the case. Would that be a problem, do you think?

A: Yes.

Gambill depo, p.117, l.12 – 118, l.20

* * * * * * *

Q: Let's also assume that Major Sapp was involved in this investigation because we know from notes he produced in mid trial that he had discussed, instructed Sergeant Martin and Sergeant Motley to go to Larry Cleveland's office and ask Larry Cleveland to remove himself as a prosecutor on this case despite the fact that the testimony up to that point had been, well, you know, we went down there and Larry Cleveland said he'd just go ahead and get off the case. Number one, would it be a problem producing notes that were properly producible prior to trial in the middle of trial?

A: That's improper.

Gambill depo, p. 119, l.10 – 119, l.20

Mr. Gambill would have taken action if he had been aware of the cozy relationship between KSP and State Farm Insurance Company.

Q: (By Mr. Clay) And it's true, in fact, isn't it, that Detective Riley not only received one vehicle from State Farm or through the recovery efforts of stolen property that State Farm had received and subsequently leased to some other agency or whatever, were Kentucky State Police enjoyed the use of these vehicles at the rate of one dollar per year, isn't it true that Detective Riley actually had a couple of those vehicles?

A: I think that's what it says. That's what he testified to.

Q: And were you made aware of e-mail traffic that went on back and for the between Detective Riley and an agent for State Farm involving how State Farm could be assisted in securing the title of this car and what Detective Riley thought they should do in order to secure a title of the car?

A: I'm not aware of that, but in clarifying one of your questions, one of the comments that Mr. O'Daniel made to me during our conversation was that he could not understand how suddenly, and he complained to this, why State Farm was going to give it - -

relinquish title to this for a dollar to him and suddenly it had been transferred to London, Kentucky to a State Farm office down there. Now, I have since heard that maybe there's an involvement between Kentucky State Police and the London office.

Q: Well, in fact, Detective Riley, I believe, in his deposition said that he had put on training for State Farm for which he received reimbursement?

A: Right.

Q: Is that the kind of relationship that you think could, at least, give rise to the appearance of impropriety given Detective Riley's involvement in this scenario?

A: Well, I tell you if I had known this, what I heard about with the State Farm connection, it would have been a much - - I would have filed a formal complaint. I would have done a hell of a lot more than what I did. You know, this smells to me, just the sense that there is a connection between State Farm and the Kentucky State Police and it started to take on an odor that's nauseating to me.

Q: So when they talked about Mr. O'Daniel using Justice resources to send an e-mail and to send out a letter, they didn't ask you about obstruction of justice. Is that a problem when you hide exculpatory evidence?

A: I've also heard one other thing and that is every state trooper, and you can write this down, is required to get insurance from State Farm. I don't know if that's true or not. I don't know. And that sounds - - you can laugh now, you know, but I don't know if that's true. But certainly there's a rumor out there. You know things start coming out of the woodwork after these things. So and I've heard it was - - there's somebody who owns the dealership of State Farm in London. I've heard that. So these are things that are of grave concern to me, the more I see this - -

Gambill depo, p.121, l.11-p.123, l.13

ARGUMENT

I. QUALIFIED IMMUNITY

The issue of qualified immunity is not properly before the Court at this time. The Appellee has submitted a Motion to Supplement the Record on Appeal that further addresses why qualified immunity is not currently at issue.

II. ABSOLUTE IMMUNITY

The misconduct of the Appellants is not shielded by absolute immunity. It is important to make clear that the Court of Appeals fully noted all of the Appellants' arguments pursuant to *Rehberg v. Paulk*, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012), fully analyzed the relevant case law, and fully rejected the Appellants' arguments that they are entitled to absolute immunity in the case *sub judice*. *Martin v. O'Daniel,* 2014 Ky. App. LEXIS 105, at *18-20. The Court gave *Rehberg* due consideration because the Court of Appeals devoted a full three pages of its opinion to the issue. Appellant Motley's assertion, in his Motion for Discretionary Review, that the Court of Appeals "effectively disregard[ed]" *Rehberg* is a gross misrepresentation of the Court of Appeals' most recent decision.

Stated as simply as possible, the Court of Appeals held that *Rehberg* does not afford these Appellants absolute immunity because *Rehberg* comports with Kentucky precedent stretching back over 100 years. See *Reed v. Isaacs*, 62 S.W.3d 398, 299 (Ky. App. 2000), citing *McClarty v. Bickel*, 155 Ky. 254, 159 S.W. 783, 784 (1913). *Rehberg* held that a grand jury witness was entitled to the same immunity as a trial witness in a § 1983 action (132 S. Ct. at 1510), and the Court of Appeals correctly noted that this holding does not expand upon well settled Kentucky law.

Though the law in Kentucky and in *Rehberg* would bar a malicious prosecution claim if that claim were based solely on false testimony before the grand jury, neither provides absolute immunity to all actions outside the grand jury. The *Rehberg* court stated the following:

> [o]f course we do not suggest that absolute immunity extends to *all* activity that a witness conducts outside the grand jury room. For example,

> we have accorded only qualified immunity to law enforcement officials who falsify affidavits, *see Kalina v. Fletcher*, 522 U.S. 118, 129-131, 118 S.Ct. 502, 139 L.Ed.2d 271 (1997); *Malley v. Briggs*, 475 U.S. 335, 340-345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), and fabricated evidence concerning an unsolved crime, *see Buckley v. Fitzsimmons*, 509 U.S. 259 at 272-276, 113 S.Ct. 2606.

As has been the argument of the Appellee from day one of this case, all three Appellants in this case are liable for Appellee's malicious prosecution claim because of actions they took outside of testimony Martin offered to the grand jury or at the criminal trial.

a. Appellants Motley and Sapp

Appellants Motley and Sapp's reliance on *Rehberg* for the defense of absolute immunity is misplaced.[12]

As for Motley, his role in the criminal prosecution was not confined to investigating and testifying at the O'Daniel criminal trial. His contribution to the conspiracy has been fully documented, ***supra***. Likewise, Sapp did not testify before the grand jury, and his testimony at trial is not the basis for his malicious acts.

Motley and Sapp put "the law in motion against the plaintiff," and they actively kept the law in motion against O'Daniel through the completion of the trial, *Cravens v. Long,* 257 S.W.2d 548 (Ky.1953).

b. Appellant Martin

Though Appellant Martin did testify before the grand jury, *Rehberg* does not provide grounds for absolute immunity for all conduct that took place prior, and

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[12] Motley claims absolute immunity relating to his actions "FOR INVESTIGATING AND TESTIFYING IN THE CRIMINAL TRIAL." (Motley brief, p.14)
Sapp asserts "absolute immunity as to their testimony before the Franklin County Grand Jury and in the Appellee's criminal trial." (Sapp brief, p. 9)

subsequent, to his grand jury testimony. Additionally, a witness's false or misleading testimony before the grand jury can be used to rebut the grand jury's finding of probable cause. *Whitlock v. Haney*, 2012 Ky. Unpub. LEXIS 64 (Ky., Jan. 20, 2012).[13]

The Appellants are not shielded by absolute immunity for the following acts that took place:

(1) Appellant Martin concealed exculpatory evidence, specifically the May 9, 2006, interview of Eva McDaniel and the notebook of Appellant Sapp and withheld production until confronted with a specific request identifying the third statement of Eva McDaniel and a specific request from the Special Prosecutor for the Commonwealth Tom Van De Rostyne for production of the concealed interview. Reference to this interview is also conspicuously absent from any KDP-41, Form Evidence/Recovered Property, prepared in this case by Appellant Martin.

Appellant Sapp's notes also were not produced pursuant to a subpoena *duces tecum* which was served upon the Appellant Sapp. Notes were only produced, as has been the allegation since the Respondent submitted his verified complaint, three days into the trial of the criminal prosecution. These notes were clearly *Brady/Giglio* material because they contradicted the State Police assertion that Larry Cleveland had requested that he be removed as prosecutor on the case originated with KSP, specifically, Appellant Sapp, and this request was communicated to Mr. Cleveland at a meeting attended by Appellants Sapp, Motley, and Martin. In addition to being produced under the authority of

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[13] *Kentucky Rules of Civil Procedure*, Rule 76.28 (4)(c) Rule for citing unreported appellate decisions. Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.

Brady/Giglio, these notes were producible under RCr 7.26; yet Sapp intentionally concealed these notes until mid-trial.

Additionally, counsel for the Appellee, the undersigned, had a discussion with Mr. Cleveland in which Mr. Cleveland discussed his recollection of the conversation he had had with the Appellants. Counsel for the Appellee saw a sticky note in Mr. Cleveland's file, which had the question "where is the intent?" (Mr. Cleveland stated that he had seen the interview of Eva McDaniel conducted by the Defendant Motley on May 9, 2006). The May 9, 2006, interview was a pivotal piece of evidence in Mr. Cleveland's decision to decline prosecution.

(2) Despite repeated orders emanating from the Justice Cabinet, specifically from the Lt. Governor Steve Pence and Deputy Justice Secretary Cleve Gambill, Appellants Sapp and Motley defied this order and, in fact, disobeyed orders to have the vehicle and the investigation removed from KSP on at least two occasions. In their testimony both Lt. Governor Pence and Deputy Justice Secretary C. Cleveland Gambill testified that the initial involvement of the Kentucky State Police in the recovery of this vehicle was a *civil matter* and that KSP should not be involved in attempting to resolve a dispute between State Farm Insurance and the Appellee in this action because it was a civil dispute. Both Lt. Governor Pence and Deputy Justice Secretary C. Cleveland Gambill testified about orders that were given to Kentucky State Police to remove itself from involvement in the determination as to who the lawful owner of this vehicle was, but KSP, and, specifically, Appellants Sapp and Motley insubordinately refused to comply with these orders.

(3) Appellant Motley attended three meetings with Franklin County

Commonwealth's Attorney Larry Cleveland in which the Appellants sought the indictment of the Appellee.

(4) Testimony of Appellant Sapp established that Motley "wanted the whole bunch indicted." The "whole bunch" included Lt. Governor Steve Pence, Deputy Justice Secretary C. Cleveland Gambill, Justice Cabinet Counsel Luke Morgan, and O'Daniel.

(5) The extent of Appellant Motley's anxiety and malice is reflected by a comment he made to then KSP Commissioner Mark Miller on May 5, 2006, at the Kentucky Oaks Day at Churchill Downs. Appellant Motley asked Commissioner Miller if he, Motley, could continue to be effective in his post as a result of the order to remove the investigation from the Kentucky State Police. He further told Commissioner Miller that it was the worst day of his life when he was told that this investigation had to be removed from his responsibility.

(6) The Appellant Motley met with Special Prosecutors Hon. Dave Stengel and Tom Van De Rostyne along with Appellant Martin and failed to disclose to either special prosecutor the existence of the May 9, 2006, interview of Eva McDaniel. It is apparent from the content of the three interviews of Eva McDaniel conducted by one or more of the Appellants that the second interview was designed to "clean up" awkward exculpatory information which Eva McDaniel had given to Motley at the time of her first interview. It is also evident that the third interview was more accusatory in tone by those interviewing Ms. McDaniel in an attempt to intimidate her into giving evidence, which the Appellants might have used successfully against O'Daniel in a criminal prosecution. Ms. McDaniel was very graphic in her description of her reactions to this third interview. She felt as if she was being accused of criminal conduct. In fact, Ms. McDaniel was

accused of "trying to buy" O'Daniel's vote during the course of her third interview.

Based on the foregoing, the Court of Appeals has not once, but twice, held that Appellants are not entitled to immunity from O'Daniel's malicious prosecution claim, absolute or qualified. The Court of Appeals specifically noted, in regards to *Rehberg*, that subsequent testimony before a grand jury does not insulate a malicious prosecution defendant from previous actions giving rise to the claim. *O'Daniel v. Sapp*, 2014 Ky. App. LEXIS 105 at Fn. 4. O'Daniel has made sufficient allegations against Appellants as set forth above in the time prior to the grand jury proceeding. Certainly, actions made subsequent to grand jury proceedings, cannot be cloaked in the immunity set forth in *Rehberg*. Accordingly, the Court of Appeals' decision to reverse the trial court on this issue should be affirmed.

III. INSTITUTION OR CONTINUATIO OF A CRIMINAL ACTION.

Appellants contend that the Court of Appeals direction to the trial court to analyze O'Daniel's malicious prosecution in accordance with the federal precedent of *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010), necessitates review because Appellants allege such analysis would be a departure from Kentucky malicious prosecution precedent. Appellants are incorrect in this assertion because the Court of Appeals did not depart from Kentucky precedent in instructing the lower court to analyze consistent with *Sykes*, but rather used *Sykes* as persuasive authority to give meaning to the elements of malicious prosecution as they are stated in state law precedent.

In Kentucky,

> *[g]enerally speaking*, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal and civil action. They are: (1) the *institution or continuation* of original judicial proceeding, either civil or criminal, or of administrative or

> disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack or probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981) (Emphasis added.) *Raine* represents a general statement of what is required to maintain a malicious prosecution action in this state. Though the above does constitute the law in Kentucky, this is not a statute, and the specific language used to outline the elements is not set in stone.

Historically, malicious prosecution has not been favored in the law. *Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989). Public policy requires individuals to have access to the courthouse for relief in civil matters. Additionally, the Commonwealth must be able to conduct proper prosecutions without retaliation. However, malicious prosecution is an important cause of action that helps to prevent abuse that has been perpetrated through the use of our judicial system. To maintain the integrity of the court, one who brings a claim for malicious prosecution must strictly adhere to the elements of the tort. *See Prewitt*, 777 S.W.2d, at 895.

The Court of Appeals correctly recognized the need to adopt persuasive authority from the Western District of Kentucky opinion in *Phat's Bar & Grill v. Louisville Jefferson County Metro Government*, 918 F. Supp. 2d 654 (W.D. Ky. 2013), to help clarify and give meaning to the elements of malicious prosecution as they are stated in state law precedent. *O'Daniel v. Sapp*, 2014 Ky. App. LEXIS 105 at *22-25 ("We find persuasive the reasoning in *Phat's Bar & Grill* and its reliance on *Sykes v. Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010), that a malicious prosecution action may be maintained *sub judice.")*

The court in *Sykes* used the following as the standard which is required to maintain a malicious prosecution action: (1) the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute; (2) the plaintiff must show that there was a lack of probable cause for the criminal prosecution; (3) the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a depravation of liberty; (4) the criminal proceeding must have been resolved in the plaintiff's favor. *Sykes v. Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010).

In the case before this Court, the first element was at issue, namely "the *institution or continuation* of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings." (Emphasis added). Importantly, the Court of Appeals did not mandate a departure from the elements of malicious prosecution as they are stated in *Raine*; rather, the Court was properly persuaded by federal authority on what import to give the words "institute" and "continue."

Appellants' fear that "every criminal prosecution that results in dismissal or acquittal" will result in a malicious prosecution claim is unfounded because, as is the case here, a malicious prosecution plaintiff still has to overcome the presumption of probable cause that exists upon an indictment's being issued. O'Daniel overcomes this presumption in regards to these Appellants through evidence of their "prosecutor shopping," willful insubordination toward orders from the Justice Cabinet, and intentional withholding of exculpatory evidence from O'Daniel in the criminal case. These actions are the type of evidence the *Sykes* court was speaking of when it stated "[i]f police officers have been instrumental in the plaintiff's continued confinement or

prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded." *Sykes*, 625 F.3d, at 318. *Sykes* is not a departure from *Raine*, but was rather used by the Court of Appeals to define what Kentucky state precedent meant by "institute or continue" a prosecution.

Indeed, *Raine* is not the only statement of the elements of malicious prosecution in Kentucky and by no means have all Kentucky courts through the years used identical language in stating the elements. For example, in *Cravens v. Long*, 257 S.W.2d 548 (Ky. 1953), the then highest court of Kentucky describes the first element as when "the defendant was the proximate and efficient cause[14] of putting the law in motion against the plaintiff." In *Cravens*, a garage owner procured a warrant that was subsequently dismissed and testified before a grand jury to secure an indictment against a customer who had left a check as collateral for test-driving the truck he had left at the garage owner's establishment. *Id.*, at 548. After finding that the repairs were insufficient, the customer returned the truck to the garage owner, but the garage owner attempted to cash the check in contravention of their agreement. *Id.* After the check was refused for insufficient funds, the garage owner took the aforementioned acts to get the customer charged with an offense for which he was later acquitted. *Id.*, at 548-49. Despite the trial court's grant of a directed verdict in favor of the garage owner, the Kentucky Court of

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[14] "Efficient cause" is a concept postulated by Aristotle in *Physics* II 3 and *Metaphysics V 2*, in which he describes the efficient cause of something as the "primary source of the change or rest," e.g., the artisan, the art of bronze-casting the statue, the man who gives advice, the father of the child. Falcon, Andrea, "Aristotle on Causality," *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.) Under this analysis, the Appellants were the "fathers" of the investigation *and* prosecution of Appellee. This fact is not changed because they had to shop around for a second prosecutor willing to midwife their specious charges against O'Daniel into the courts.

Appeals reversed stating that the customer could proceed on his malicious prosecution claim against the garage owner. *Id.*, at 549.

What then could have been the basis for the customer's malicious prosecution claim? It could not have been the procurement of the warrant, because the warrant was dismissed. *Id.* It could not have been the garage owner's testimony before the grand jury because such testimony had been privileged under Kentucky law since 1913. See, *McClarty v. Bickel*, 155 Ky. 254, 159 S.W. 783, 784 (1913). Therefore, the Court in *Cravens* looked at the garage owner's conduct of maliciously violating the collateral agreement with the customer and subsequent efforts regarding the criminal prosecution as sufficient to establish that the garage owner was the "proximate and efficient cause of putting the law in motion against the plaintiff." In fact, all the Court required was an "absence of some explanation" by the garage owner for why the groundless prosecution went forward. *Cravens*, 257 S.W.2d, at 549.

In the case *sub judice*, there is much more of an "absence of some explanation" of why the Appellants took efforts to continue the prosecution of O'Daniel after Franklin County Commonwealth Attorney Cleveland declined pursuit of the charges sought by Appellants. When asked under cross-examination the identify of any person or organization that had been deceived by the conduct of O'Daniel, Appellant Sapp responded that the Kentucky State Police had not been defrauded by the conduct of O'Daniel; that the Department of Transportation had not been defrauded by the conduct of O'Daniel; that State Farm Insurance had not been defrauded by the conduct of O'Daniel; and that the Jessamine County Clerk Eva McDaniel had not been defrauded by O'Daniel's conduct. Appellant Sapp's concession that O'Daniel's action did not defraud

anyone effectively eliminates two elements necessary to prove the crime of Forgery Second Degree, ***viz.,*** intent and deception. This in-court admission by Appellant Sapp clearly negates the element of probable cause necessary to support the charge of Forgery Second Degree, establishes the absence of a legitimate explanation for the Appellants' continued quest to prosecute O'Daniel and evidences the collective malice of all three Appellants in their pursuit of this frivolous prosecution.

Respondent is constrained to point out that Appellant Sapp was, at the time of the prosecution, a high ranking KSP supervisor who was presumably familiar with all of the elements of Forgery, Second Degree, the charge on which he supervised the Appellee's criminal prosecution on behalf of KSP. Likewise, Appellants Martin and Motley, as KSP Sergeants, were experienced criminal investigators well versed in the elements of the crime Forgery, Second Degree.

All of these Appellants were sophisticated in the operation of the criminal justice as demonstrated by their maneuvering to secure a special prosecutor when Larry Cleveland refused to prosecute the Appellee, providing false and misleading testimony to the grand jury, and deliberate withholding of exculpatory evidence.

Taking the evidence in a light most favorable to O'Daniel, Appellants' conduct was the *causa sine qua non* for O'Daniel's criminal prosecution. Something had to get the prosecution of O'Daniel from point A to point B after Larry Cleveland declined to prosecute. But for Appellants' actions, that prosecution would not have happened. It is the "prosecutor shopping" committed by Appellants, along with the acts of intentionally withholding *Brady* material and willful disregard of orders from the Justice Cabinet in continuing to involve the state police in what was a civil matter that establish the first two

elements of O'Daniel's malicious prosecution claim. Appellants' acts constitute "institution and continuation" under *Raine*, the "proximate and efficient cause of putting the law in motion against the plaintiff" under *Cravens*, and certainly constitute "participat[ing] in such a way that aids in the decision, as opposed to passively or neutrally participating" under *Sykes*. These three statements of the first elements of malicious prosecution are not inconsistent, and do not constitute a departure from Kentucky precedent.

CONCLUSION

This Court should affirm the Court of Appeals' third decision in this case. First, the Court of Appeals was correct that *Rehberg* does not change century old Kentucky precedent, nor does it afford absolute immunity to these Appellants. Second, the Court of Appeals' analysis of the elements of malicious prosecution simply clarifies and interprets, and does not depart from, established Kentucky precedent. For all the foregoing reasons, Appellee O'Daniel respectfully requests the Court of Appeals' decision in this case be affirmed.

Respectfully,

THOMAS E. CLAY, P.S.C
CLAY DANIEL WALTON & ADAMS, PLC
Meidinger Tower, Suite 101
462 S. Fourth Street
Louisville, KY 40202
(502) 561-2005
tclay@tclaylaw.com
Counsel for Appellee, Steve O'Daniel